

## § 2204.303

final under section 12(j) of the OSH Act, 29 U.S.C. 661(i); or

(2) The date on which the order of the Commission affirming, modifying, or vacating the Secretary's citation or proposed penalty or directing other appropriate relief becomes final under section 10(c) of the OSH Act, 29 U.S.C. 659(c).

### § 2204.303 Answer to application.

(a) Within 30 days after service of an application, the Secretary shall file an answer to the application.

(b) If the Secretary and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer for an additional 30 days, and further extensions may be granted upon request.

(c) The answer shall explain in detail any objections to the award requested and identify the facts relied on in support of the Secretary's position. If the answer is based on any alleged facts not already in the record of the proceeding, the Secretary shall include with the answer either supporting affidavits or a request for further proceedings under § 2204.307.

### § 2204.304 Reply.

Within 15 days after service of an answer, the applicant may file a reply. If the reply is based on any alleged facts not already in the record of the proceeding, the applicant shall include with the reply either supporting affidavits or a request for further proceedings under § 2204.307.

### § 2204.305 Comments by other parties.

Any party to a proceeding other than the applicant and the Secretary may file comments on an application within 30 days after it is served or on an answer within 15 days after it is served. A commenting party may not participate further in proceedings on the application unless the Commission determines that the public interest requires such participation in order to permit full exploration of matters raised in the comments.

## 29 CFR Ch. XX (7-1-01 Edition)

### § 2204.306 Settlement.

The applicant and the Secretary may agree on a proposed settlement of the award before final action on the application, either in connection with a settlement of the underlying proceeding, or after the underlying proceeding has been concluded. If a prevailing party and the Secretary agree on a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement.

### § 2204.307 Further proceedings.

(a)(1) The determination of an award shall be made on the basis of the record made during the proceeding for which fees and expenses are sought, except as provided in paragraphs (a)(2) and (a)(3) of this section.

(2) On the motion of a party or on the judge's own initiative, the judge may order further proceedings, including discovery and an evidentiary hearing, as to issues other than substantial justification (such as the applicant's eligibility or substantiation of fees and expenses).

(3) If the proceeding for which fees and expenses are sought ended before the Secretary had an opportunity to introduce evidence supporting the citation or notification of proposed penalty (for example, a citation was withdrawn or settled before an evidentiary hearing was held), the Secretary may supplement the record with affidavits or other documentary evidence of substantial justification.

(b) A request that the judge order further proceedings under this section shall specifically identify the information sought or the disputed issues and shall explain why the additional proceedings are necessary to resolve the issues.

[46 FR 48080, Sept. 30, 1981, as amended at 52 FR 5457, Feb. 23, 1987]

### § 2204.308 Decision.

The preparation and issuance of decision shall be in accordance with § 2200.90. Additionally, the judge's decision shall include written findings and conclusions on the applicant's eligibility and status as a prevailing party and an explanation of the reasons for

any difference between the amount requested and the amount awarded. The decision shall also include, if at issue, findings on whether the Secretary's position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust.

#### § 2204.309 Commission review.

Commission review shall be in accordance with §§ 2200.91 and 2200.92. The applicant, the Secretary, or both may seek review of the judge's decision on the fee application, and the Commission may grant such petitions for review or direct review of the decision on the Commission's own initiative. The Commission delegates to each of its members the authority to order review of a judge's decision concerning a fee application. Whether to review a decision is a matter within the discretion of each member of the Commission. If the Commission does not direct review, the judge's decision on the application shall become a final decision of the Commission 30 days after it is received and docketed by the Executive Secretary of the Commission. If review is directed, the Commission shall issue a final decision on the application or remand the application to the judge for further proceedings.

#### § 2204.310 Waiver.

After reasonable notice to the parties, the Commission may waive, for good cause shown, any provision contained in this part as long as the waiver is consistent with the terms and purpose of the EAJA.

#### § 2204.311 Payment of award.

An applicant seeking payment of an award shall submit to the officer designated by the Secretary a copy of the Commission's final decision granting the award.

### PART 2205—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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AUTHORITY: 29 U.S.C. 794.

SOURCE: 51 FR 22892, 22896, June 23, 1986, unless otherwise noted.

#### § 2205.101 Purpose.

This part effectuates section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

#### § 2205.102 Application.

This part applies to all programs or activities conducted by the agency.

#### § 2205.103 Definitions.

For purposes of this part, the term—